Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1338

JACK MASCHHOFF,
Petitioner,
vs.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW & LOCAL 22 NEWSPAPER GUILD OF DETROIT, a/k/a NEWSPAPER GUILD OF DETROIT and EMIL MAZEY,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Jack Maschhoff, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit, dismissing the appeal of the Petitioner.

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GROUNDS ON WHICH JURISDICTION IS INVOKED

1. Title 28, USCA, Sec. 2101. A writ of certiorari is sought to review action taken by the Court of Appeals for the 6th Circuit dismissing plaintiff's Appeal and denying Motion for Rehearing, which was entered December 22, 1975.

2. Title 28 USCA, Sec. 2072, defines the powers of the Supreme Court in reference to the Rules of District Courts under which authority the U. S. District Court for the Eastern District of Michigan, Southern Division, adopted Rule IX-A, which Rule provides for filing a Motion for Rehearing within 20 days after the entry of judgment.

The interpretation of this Rule is sought in view of the fact that plaintiff filed his Motion for Rehearing in pursuance of said Rule, and filed his Notice of Appeal within 30 days after denial of his Motion for Rehearing.

The District Judge filed his opinion and order denying the Motion for Rehearing on June 3, 1975, which was more than 30 days after the entry of judgment granting defendants' motions for summary judgment.

3. A request is being made to the U. S. Court of Ap-Apeals, 6th Circuit, to transmit the entire record of the plaintiff's Appeal filed in the said Court of Appeals.

4. Title 28 USCA 19.1(b) U. S. Supreme Court Rules.

The decision of the U. S. Court of Appeals, 6th Circuit, is in conflict with the decisions of other Courts of Appeal on the same or similar matters.

The said Court of Appeals has decided an important question in reference to District Court Rules, particularly Rule IX-A of the U. S. District Court of Michigan, East-

ern District, Southern Division, which has not but should be settled by this Court.

Because the dismissal of plaintiff's Appeal is in conflict with applicable decisions of this Court.

Because the dismissal of plaintiff's Appeal without regard to Rule IX-A of the U. S. District Court action is a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Because plaintiff had a right to rely upon Rule IX-A of the Rules of the U. S. District Court of Michigan, Eastern District, Southern Division, in filing his Motion for Rehearing.

That unless certiorari is issued, plaintiff will have been denied the equal protection of the laws in violation of the 14th Amendment of the Constitution of the United States.

CIRCUMSTANCES OF THE CASE

Plaintiff commenced his suit against the defendants in the Circuit Court for the County of Wayne, State of Michigan, on August 28, 1974. Defendants filed their petitions for removal to the U.S. District Court, for the Eastern District of Michigan, Southern Division, alleging original jurisdiction by reason of defendants being labor organizations representing employees in an industry affecting commerce within the meaning of the Labor-Management Relations Act of 1947. Jurisdiction was accepted by the District Court.

Defendants filed their answers, followed by motion for Summary Judgments. Replies to defendants' answers and

affidavits and exhibits opposing motion for Summary Judgments were filed by Plaintiff.

On March 10, 1975, a hearing was held on the motions for Summary Judgment before the Hon. James P. Churchill, U. S. District Judge. His Memorandum Opinion was mailed to counsel for plaintiff. Subsequently, an order, dated April 18, 1975, signed by Judge Churchill, granting defendants' motions for Summary Judgment, was filed. A notice by card, stating "An order was entered on the docket on April 18, 1975". The word "judgment" on the card was x-ed out. There was no postmark on the card to indicate when the card was mailed to counsel for plaintiff. (It appears that documents mailed from the District Court to counsel do not have postmarks. There is language to the effect that postage is being paid by the Government.)

Plaintiff filed his Motion for Rehearing in the District Court on May 2, 1975, under U. S. District Court Rule No. IX-A, there being no rule in the Federal Rules of Civil Procedure covering motions for rehearing of Summary Judgments where no trial has been had and no testimony taken. The District Court accepted plaintiff's Motion for Rehearing.

Motion for Rehearing was denied June 3, 1975. Plaintiff filed his appeal to the Circuit Court of Appeals on July 2, 1975, paid the requisite fees, and filed bond for costs. The District Court accepted the appeal.

Joint Appendix was filed in the Sixth Circuit of the Court of Appeals. Briefs were filed by plaintiff and defendants.

Defendants filed their joint motion to dismiss plaintiff's Appeal, copy of which was received by counsel for plaintiff on August 11, 1975. Plaintiff's Answer to said motion was filed on August 15, 1975.

On November 3, 1975, the Court of Appeals for the Sixth Circuit dismissed plaintiff's appeal, "For lack of Jurisdiction, Rule 4 (a) Federal Rules of Appellate Procedure".

Plaintiff filed his Petition for Rehearing on November 11, 1975, in which plaintiff, *inter alia*, recited under oath, that Judge Edwards was disqualified from participating in this cause by reason of his past and continuing friendship, association, and interest with the defendants UAW-CIO and its secretary-treasurer, Emil Mazey.

On December 22, 1975, the Court of Appeals for the Sixth Circuit denied plaintiff's Petition for Rehearing, and in which decision Judge Edwards participated.

STATEMENT OF FACTS RELATIVE TO THE ISSUES

Plaintiff's Complaint sets forth that he was an employee of the UAW, and had been for upwards of twenty years; that by reason of the nature of his work, he became a member of the defendant Newspaper Guild, the exclusive bargaining agent representing employees of the defendant UAW who were identified with publicity work for the UAW, including photography and art work. Plaintiff further stated that he had been originally hired by the then President, Walter Reuther; that the UAW adopted a classification of plaintiff's work which covered artists and display design, all areas of still photography, cinematography and TV animation; that he had done his work over the years competently, successfully, and earned the commendation of the UAW.

The Guild, representing employees of UAW who were engaged in Public Relations work, including the kind of work

performed by plaintiff, had entered into an agreement with the UAW covering the relationship of employer and employees, which had been and was in effect on June 8, 1970; that on June 8, 1970, defendant Mazey, Secretary-Treasurer of the UAW, sent a letter to the plaintiff informing him that his classification, in which he was the only employee, had been discontinued, and his services would no longer be required.

Plaintiff alleged that the statement for his lay-off was untrue; that the work that he had been doing was not discontinued, but had been carried on by others. Plaintiff further claimed that defendant Mazey had previously developed a prejudice and ill-will toward him, and had sought to have him discharged, but was unsuccessful due to the intervention of Walter Reuther; that shortly after Reuther's death (May 9, 1970), defendant Mazey causing plaintiff to be laid off without just cause, in violation of the agreement.

Plaintiff claimed that he sought to obtain the efforts of defendant Guild to process his claim and grievance through the grievance procedure established between the UAW and the Guild. That the Guild and UAW and Mazey, working in collusion, denied Plaintiff his rights under the agreement, particularly as to binding arbitration required by the agreement; that the Guild had deliberately, fraudulently and in collusion with the UAW and Mazey, refused to fully process plaintiff's grievance, and had accepted the position of the UAW against the plaintiff, in violation of the UAW-Newspaper Guild union agreement.

That said plaintiff, being over fifty years of age, has found it difficult, if not impossible, to obtain work comparable to what he had been doing. That through the years of his work with the UAW, he had developed an expertise in

the Public Relations field relating to union activities, but was unable to secure other employment. That as a result of the unlawful acts on the part of the defendants, plaintiff had suffered damage and injury and would continue to suffer substantial damage, including loss of wages, fringe benefits and other advantages as an employee of the UAW. Plaintiff prayed for judgment and demanded a jury trial.

WHY CERTIORARI SHOULD BE GRANTED

I.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LAW PERTAINING TO RULES OF THE U. S. DISTRICT COURT WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT, PARTICULARLY RULE IX-A OF THE RULES OF THE U. S. DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

(a) Section 2072 of Title 28 U.S. Code Annotated, provides:

> "RULES OF CIVIL PROCEDURE FOR DISTRICT COURTS
>
> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, *and motions*, and the practice and procedure of the district. Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution. (Emphasis ours.)
>
> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof

but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court." (Emphasis ours.)

(b) Rule 83, of the Rules of Civil Procedure, provides:

"Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

(c) Rule IX-A of the Rules of the U. S. District Court for the Eastern District of Michigan, Southern Division, must necessarily have been approved by the Supreme Court of the United States as part of the powers of the Supreme Court, *Rules 83, of the Rules of Civil Procedure, supra.*

(d) Rule IX-A of the Rules of the U. S. District Court, *supra,* sec. 1 provides:

"TIME. A motion for rehearing may be filed within 20 days, after judgment is entered, unless the

Court grants further time upon a motion filed within such 20 days.

• • • • •

Sec. 4. *Grounds.* Generally, and without restricting the discretion of the Court, motions for rehearing which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, will not be granted. The movant must not only demonstrate a palpable defect by which the Court and the parties have been misled but also that a different disposition of the case must result from a correction thereof."

(e) Rule 59 of the Federal Rules of Civil Procedure, New Trials, Amendment of Judgment, is not applicable to the case at bar in view of the fact that there was no trial, no testimony was taken, and plaintiff's claim was an action at law; it was not a suit in equity.

(f) The decision of the Court of Appeals dismissing plaintiff's Appeal failed to take into account Rule IX-a of the Rules of the U.S. District Court, for the Eastern District of Michigan, Southern Division, *supra,* which provisions covering motion for rehearing, are applicable to the situation in the case at bar, and which were followed by plaintiff.

(g) There was no final Order entered in the cause until the denial of plaintiff's Motion for Rehearing, June 3, 1975. Plaintiff filed his appeal on July 2, 1975. It was timely filed, within 30 days after the final order.

(h) The Appeal of plaintiff was accepted by the District Court and all requisite fees of the District Court and Court of Appeals were paid, and the bond for costs on appeal was accepted by and filed in the District Court.

(i) Plaintiff contends that the decision of the U. S. Court of Appeals for the 6th Circuit ignores Rule IX-A of the District Court, the provisions of which *do not abridge, enlarge or modify any substantive right.* It does preserve the right of trial by jury as provided in Sec. 2072, Title 28, USCA, *supra.* (Emphasis ours.)

Plaintiff contends that he had the right to rely upon the Rule of the District Court, *supra,* as there was no other rule covering the situation in the case.

II.

THE U. S. COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS ON SIMILAR MATTERS.

Plaintiff contends that there was no final appealable order or judgment in the instant case until the final order denying plaintiff's Motion for Rehearing had been denied, to-wit: June 3, 1975. The Notice of Appeal was filed within thirty days thereafter.

Rule 2, Title 28 U.S. Code Annotated Rules of Appellate Procedure.

"In the interest of expediting decision, or for other good cause shown, a Court of Appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

In the case of *Suggs v. Mutual Benefit Health & Accident Ass'n,* 115 F 2d 80 (1940), at page 82, the Court said:

> "3.4) A judgment is not generally treated as final until a motion for a new trial or rehearing which

> has been entertained by the court has been disposed of. In such case the time for appeal runs from the date of such disposition. United States v. Ellicott, 223 U.S. 524, 32 S. Ct. 334, 56 L. Ed 535. So if a motion or petition for rehearing is made or presented in session and entertained by the court, the time limit for a writ of error or appeal does not begin to run until the motion is disposed of. Aspen Mining & Smelting Co. v. Billings, supra; Zimmern et al v. U.S., supra; Washington, etc. Railroad Co. v. Bradley, 7 Wall. 575, 74 U.S. 575, 19 L Ed. 274; Memphis v. Brown, 94 U.S. 715, 24 L. ed 244; Brockette et al v. Brockett, 2 How. 238, 43 U.S. 238, 11 L. Ed. 251; U.S. v. Steinberg, 2 Circ. 100 F 2d 124.
> "(5) Where the court has power to further review its judgment, it cannot be said that the judgment is final as long as it is being considered by the Court. It makes no difference whether the attention of the court is directed to a further consideration of its judgment by a pleading filed as a matter of right, or a pleading which has no standing in the case as a matter of law, or springs from the court itself. • • • • • "

Motteler v. J. A. Jones Constr. Co., 447 F 2d 954, 955 (1971)

(United States Court of Appeals, Seventh Circuit)

> "While a literal reading of the Federal Rules of Civil Procedure would support the appellee's position, the Supreme Court has refused to deny a litigant access to the court of appeals because of late filing of his notice of appeal where the late filing resulted from the litigant's reliance on a district

court's erroneous grant of an extension of time within which to file a motion, which, if properly filed, would terminate the running of the time for filing an appeal. (Thompson v. Immigration and Naturalization Service, 375 U.S. 384; 84 S.Ct. 397, 11 L. Ed 2d 404 (1964) which reversed a decision of this court dismissing a late-filed appeal.

"There the Supreme Court held that where a party files a post-judgment motion which, if timely filed, would postpone the deadline for his appeal, but files it too late under the applicable rule, his reliance on statements or actions of the district court indicating that his motion was timely filed will relieve him of the detrimental consequences that would otherwise result."

Alley v. Dodge Hotel, 501 F 2d 880, 884 (1974)

(Pro se litigant moved for leave to appeal in forma pauperis. His appeal was dismissed for lack of jurisdiction.)

"Since timeliness in noticing appeals is 'mandatory and jurisdictional," compliance with applicable requirements 'is of the utmost importance'. Certainly a scrupulous satisfaction of the formal specifications of rules governing appeals is good practice and good sense; indeed, some courts have demanded strict performance by would-be appellants. But it is clear beyond cavil that Appellate Rules 3 and 4 tolerate a common sense approach to timely filing, and do not insist upon 'literal compliance in cases in which it cannot fairly be exacted. . . . ' We think a filing requirement is met by a positive, substantial

and unequivocal effort to discharge it, and that innocuous irregularities incidental to such an endeavor should be disregarded when considerations of fairness dictate that course. We agree with the Fifth Circuit that ' . . . it would be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the (rules) is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with THEM defeats substantial rights.' "

Jones v. Nelson, 484 F 2d 1165 (1973)

"An appeal will not be lost for what may be deemed 'hypertechnical' reasons."

Plaintiff contends that (a) the Court of Appeals failed to give any consideration to the Rule *supra,* the cases decided by other Federal Courts of Appeals, (b) the fact that plaintiff's motion for rehearing was filed in pursuance of Rule IX-A, of the U. S. District Court of Michigan upon which plaintiff had the right to rely; (c) that the final disposition by the District Court was the denial of his motion for rehearing, June 3, 1975; (d) that his appeal was timely taken to the Circuit Court of Appeals within 30 days after the final order was entered in the District Court; (e) that his appeal was accepted by the District Court upon filing thereof, payment of the requisite fees and the filing of the bond; (f) the merits of plaintiff's case; (g) the denial to plaintiff of the equal protection of the law and his right to a jury trial.

III.

THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

It is Plaintiff's position that Rule 59, of the Rules of Civil Procedure, relied upon by Defendants and the Court of Appeals in the dismissal of his appeal, was not applicable to the situation existing at the time he filed his Motion for Rehearing. His complaint was dismissed upon the motions of the defendants for Summary Judgment. There was no trial, and no testimony taken. His motion for rehearing was filed in pursuance of Rule IX-A, of the Rules of the U. S. District Court of Michigan, *supra*, which covered the situation in his case. It is his contention that he had the right to rely upon said Rule, in view of this Court's power in reference to the promulgation of rules by the District Courts.

Wolfsohn v. Hankin, et al, 376 US 203, 11 L Ed 2d 636 (1964); 84 S Ct 699, *reh den* 376 US 973, 12 L Ed 2d 87, 84 S Ct 1133.

"SUMMARY"

"Four days after the entry of summary judgment in a case before the United States District Court for the District of Columbia, the District Court signed an order purportedly extending the appellant's time to move for a rehearing. One month later the motion was filed, and about 4 months thereafter it was denied. Within 30 days after the denial of the motion for rehearing, the appellant filed a notice of appeal.

The United States Court of Appeals dismissed the appeal as untimely, stating that the District Court could not extend the time for filing the motion for rehearing, that the motion for rehearing was therefore untimely, and that consequently the motion for rehearing could not extend the time for appeal.

On certiorari, the Supreme Court of the United States reversed.

CLARK, HARLAN, STEWART, AND WHITE, JJ. dissented on the ground that the Court's decision subverted the Federal Rules of Civil Procedure by granting trial judges the de facto power to grant extensions of time for filing motions for rehearing."

In the case at bar, Plaintiff followed the rule adopted by the District Court which provided for the filing of motions for rehearing within 20 days after judgment and covered the situation in reference to plaintiff's case. He filed his motion on May 2, 1975; the District Court accepted his motion. The Court denied his motion on June 3, 1975. He filed his appeal on July 2, 1975, within the 30 days thereafter.

Thompson v. Immigration and Naturalization Service, 375 US 384, 11 L Ed 2d 404, 84 S Ct 397, January 6, 1964.

The Court of Appeals dismissed the appeal on the ground that the post-trial motions did not toll the running of the 60-day time period for the appeal, because the motions were untimely.

"The instant cause fits squarely within the letter and spirit of Harris (Harris v Cherry Meat Pack-

ers, Inc., 371 US 215, 217, 9 L Ed 2d 261). Here, as there, Petitioner did an act which, if properly done, postponed the deadline for the filing of his appeal. Here, as there, the District Court concluded that the act had been properly done. Here, as there, the petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline. And here, as there, the Court of Appeals concluded that the District Court had erred and dismissed the appeal. Accordingly, in view of these 'unique circumstances' . . . we grant certiorari, vacate the judgment, and remand the case to the Court of Appeals so that petitioner's appeal may be heard on the merits."

In the case at bar, plaintiff relief upon the local Court rule; the lower Court accepted his motion for rehearing; he denied plaintiff's motion after the 30 days had elapsed from the date of the entry of the order granting defendant's motions for Summary Judgments.

United States v. Ellicott, 56 L Ed 535, 542 (1912).

(This involved an appeal from the Court of Claims.)

(We believe the rule is applicable to the case at bar)

"The grounds for the motion to dismiss are these: (a) that the appeal was not taken within ninety days after judgment. (Rev. Stat §708, U.S. Comp Stat 1901, p. 575), and (b) that the appeal prayed for and allowed was not from the judgment of January 4, 1909 'but was merely from the order overruling the motion for a new trial.'

"The motion is without merit. The general rule governing the subject of prosecuting error or taking appeals from final judgments or decrees is, we think, applicable to judgments or decrees of the court of claims, and that rule treats a judgment or decree properly entered in the cause as not final for the purposes of appeal until a motion for a new trial or a petition for rehearing, as the case may be, when entertained by the court has been disposed of; and the time for appeal begins to run from the date of such disposition. Kingman & Co. v. Western Mfg. Co., 170 U.S. 675, 680, 42 L. Ed. 1192, 1194, 18 Sup. Ct. Rep. 786. It is, we think, also manifest that the appeal was taken upon the hypothesis just stated, that the judgment entered did not become a final judgment for the purposes of appeal until the motion for a new trial had been disposed. Texas & P. R. Co. v. Murphy, 111 U.S. 488, 28 L. Ed. 492, 4 Sup. Ct. Rep. 497."

As demonstrating the position of the Supreme Court of the U. S. referring to time limits, we respectfully direct the Court's attention to the case of *Schacht v. United States,* 398 US 58, 26 L Ed 2d, 44, 51, 90 S. Ct. 1555 (1970):

"Nor do I find it at all anomalous that this Court on occasion waives the time limitations imposed by its own Rules and yet treats time requirements imposed by statute as jurisdictional. As a matter of statutory interpretation, the Court has not presumed the right to extend time limits specified in statutes where there is no indication of a congressional purpose to authorize the Court to do so. Because we cannot 'waive' congressional enactments, the statutory time limts are treated as jurisdictional. On the other hand, for the time requirement of Rule 22(2), established under a broad statutory

> delegation, it is appropriate to apply the 'general principle' that '(i)t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.'"

While this is a criminal case, yet we believe it presents an attitude which applies equally to civil cases.

IV.

THE COURT OF APPEALS HAS SO FAR SANCTIONED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Plaintiff, in his appeal to the Circuit Court of Appeals for the 6th Circuit, presented the following as his "STATEMENT OF ISSUES PRESENTED FOR REVIEW."

I. Does Plaintiff's Complaint state a claim for relief?

II. Are there material disputed questions of fact which can only be determined by a trial on the merits to a jury?

III. Did the District Court view and consider plaintiff's cause in the light most favorable to him as required by the general rule of law?

Plaintiff had instituted his action in the Circuit Court for Wayne County, Michigan. Subsequently, defendants petitionerd for the removal of the action on the US District Court for the Eastern District of Michigan, Southern Division. The District Court accepted jurisdiction, and the

case was assigned to the Honorable James P. Churchill, District Judge.

Plaintiff's position was and is that the U. S. District Court does not have exclusive jurisdiction; that the jurisdiction of said court is concurrent with that of the Michigan Circuit Courts; that general rules would apply equally to the District Court as to the Michigan Circuit Court.

> *Jenkins v. McKeithen,* 23 L Ed 2d 404, 395 US 411, 89 S Ct 1843 (1969).

A three-judge District Court granted the defendants' motion to dismiss for failure to state a cause of action. On appeal, the United States Supreme Court reversed and remanded, the majority of the Court holding that the allegations in the "complaint were sufficient to state a cause of action" . . . "the plaintiff being entitled to relief if he proved at trial that the commission was designed to and did act in the manner alleged in his complaint, and that its procedures failed to meet the requirements of due process."

The District Court accepted the versions of the defendants in reference to Plaintiff's cause of action, despite the fact that there are and were material disputed questions of fact which could only be determined upon a trial on the merits to a jury.

Plaintiff, in his motion for rehearing, called the Court's attention to the fact that defendants, in the affidavits in support of their motions for summary judgment, had made misleading statements by which the Court had been misled. He attached to his motion 6 exhibits which clearly indicated the misleading effect which the defendants' presentation had had on the Court. The District Judge had assumed that the plaintiff's grievance had been "satisfac-

torily settled", whereas the affidavit of defendant Mazey in support of his motion for summary judgment admitted that the grievance had been "unsatifactorily" settled.

The foregoing recitation is a demonstration of some of the disputed questions of material facts which the District Court failed to apprehend. Plaintiff contends that the District Judge absolutely failed to abide by the rule of law, oft repeated by this Court, that for the purpose of a motion to dismiss or motion for summary judgment, "the well pleaded allegations and the legitimate inferences that may be drawn therefrom are to be construed in the light most favorable to the opposing party."

Adickes v. Kress & Co, 398 US 144, 26 L Ed 2d 142, 154, 90 S Ct 98 (1970);
Poller v. Columbia Broadcasting System, 368 US 64, 7 L Ed 2d 458, 461-4 (1962);
Vaca v. Sipes, 368 US 171, 17 L Ed 2d 842, 850, 854, 856 (1967);
Redhouse v. Quality Food Sales, Inc., 511 Fed 2d 230, 234 (1975).

Nowhere, in the Memorandum Opinion of the District Judge is there any indication that he followed the rule or attempted to do so.

V.

THE HONORABLE GEORGE EDWARDS, ONE OF THE JUDGES OF THE PANEL OF THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, SHOULD HAVE DISQUALIFIED HIMSELF FROM PARTICIPATION IN PLAINTIFF'S APPEAL BECAUSE OF HIS PAST AND INTIMATE ASSOCIATION WITH DEFENDANTS UAW AND EMIL MAZEY, ITS SECRETARY-TREASURER.

Title 28, USCA, Sec. 455; INTEREST of Justice or Judge

The order of dismissal of plaintiff's appeal by the U. S. Court of Appeals for the 6th Circuit, which listed the names of the judges on the panel, was the first notice plaintiff had that Mr. Justice Edwards was one of the three judges. In plaintiffs' Motion for Rehearing, he called attention to the fact that he believed that Judge Edwards was disqualified to participate in any decision involving defendants UAW-CIO and Emil Mazey. His Petition for Rehearing was supported by his Affidavit in which he stated that Justice George Edwards began his career with the Defendant UAW in 1937, carrying on his work as an organizer for the defendant UAW for a substantial number of years. That in his employment as an organizer of the UAW he became intimately and actively associated with the higher officials of the UAW from President Walter Reuther down, including defendant Emil Mazey; that Justice George Edwards was actively engaged in working for the defendant UAW for a substantial number of years, and that in his opinion such association of Justice George Edwards created a situation which disqualified Justice George Edwards from participating in the panel of Judges involving plaintiff-appellant's case, and that Judge George

Edwards to have so participated was most prejudicial to this deponent and denied him his day in court.

Respectfully submitted,

/s/ LARRY S. DAVIDOW
Attorney for Plaintiff
3210 Book Tower
Detroit, Michigan 48226
962-9144

APPENDIX A

MEMORANDUM OPINION

(Filed April 18, 1975)

This action was brought by plaintiff Jack Maschhoff under Section 301(a) of the Labor Management Relations Act of 1947, Title 29, United States Code, Section 185(a). Plaintiff alleged that defendants International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and Emil Mazey, Secretary-Treasurer of the UAW, improperly laid him off in breach of the collective bargaining agreement under which he worked. He also alleged that defendant Local 22 of the Newspaper Guild (the Guild) breached its duty of fair representation by failing to seek arbitration of his grievance against the UAW. Each defendant is now moving for summary judgment on the grounds that plaintiff has failed to state a claim upon which relief can be granted, that he has failed to exhaust internal union remedies, and that his claims are barred by the statute of limitations. In addition, defendant Guild argues that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

Plaintiff was employed by defendant UAW from 1947 until June, 1970, when he was laid off. He was told that his lay-off was necessary because of the UAW's poor financial condition. He has not been recalled. At the time of his lay-off, plaintiff was a member of a bargaining unit which was represented by the Guild. There was then a collective bargaining agreement in effect between the UAW and the Guild which established the following procedure for the resolution of grievances:

"Article IX—Grievance Procedure

"1. The Guild shall designate a committee of its own choosing to take up with the UAW or its authorized agent any matter arising from the application of this Agreement or affecting the relations between the employees and the UAW.

"2. The UAW agrees to meet with the committee within five days after written request for such meeting. Efforts to adjust grievances shall be made on company time.

"3. Any grievance relating to the contract which has not been satisfatcorily settled within thirty (30) days of its first consideration, shall be submitted to final and binding arbitration . . . "

Plaintiff alleged in his complaint that he was laid off, not because the UAW was in financial difficulty, but rather because Emil Mazey was hostile towards him and jealous of him. He cited a number of provisions in the collective bargaining agreement which he asserts were breached by his lay-off. At the time of the lay-off, he raised his grievance with the Guild committee. The committee had a number of meetings with UAW representatives regarding the matter, but it was unsuccessful in getting the lay-off rescinded. The Guild did not seek arbitration of the grievance. In the fall of 1970, the Executive Board of Local 22 of the Guild twice considered the plaintiff's grievance and decided not to request arbitration. In May, 1973, the general membership of the Local voted on the question and also decided not to pursue arbitration of the grievance.

In order to successfully maintain a breach of contract suit against his employer, an individual employee must first exhaust the contractual grievance procedure. *Republic*

Steel Corp. v. Maddox, 379 U.S. 650 (1965). This exhaustion requirement is excused if the employee can prove that his union breached its duty of fair representation in its handling of his grievance. *Vaca v. Sipes,* 386 U.S. 171 (1967). Thus, the employer cannot be liable to the employee, even if a breach of contract is proven, unless the union is liable to the employee for breach of the duty of fair representation.

According to *Vaca,* this duty is breached

> " . . . only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." 386 U.S. at 190.

The law is well setled in this circuit that, in order to withstand a motion for summary judgment, the plaintiff in a fair representation action must present facts to support the claim of a breach of duty. In *Balowski v. UAW,* 372 F. 2d 829, 834 (1967), it was held that:

> "The allegations of a complaint alleging the breach of a Union's duty of fair representation must contain more than 'conclusory statements alleging discrimination. In particular plaintiffs must make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, for the gravaman of the rule is 'hostile discrimination'."

Plaintiff claims that the undisputed fact that the Guild did not seek arbitration of his grievance is evidence that the Guild breached its duty. The court in *Vaca* made it clear that a union member does not have an absolute right to have his grievance taken to arbitration.

> " . . . we conclude that a union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration." 386 U.S. at 192.

Plaintiff attempts to distinguish *Vaca* by arguing that the language of the arbitration clause at issue here is mandatory rather than permissive in that it contains the word "shall." However, a reading of the entire clause makes it clear that a grievance *shall* be submitted to arbitration only when it is not satisfactorily settled. Clearly, it is the right of the union and not of the individual to determine when a grievance is satisfactorily settled.

Thus, since the Guild's decision not to proceed to arbitration was not in and of itself a breach, the issue to be determined on motions for summary judgment, according to *Balowski,* is whether plaintiff has alleged facts to show that the decision was made arbitrarily, discriminatorily, or in bad faith.

Plaintiff alleges repeatedly, both in his complaint and in affidavits, that the Guild worked in collusion with the UAW to deprive him of the arbitration of his grievance. He charges that an "unholy alliance" existed among the defendants and brands their conduct as fraudulent, unfair, illegal, unethical, deceitful, and corrupt. Plaintiff has presented no facts to support these conclusory allegations.

Plaintiff also alleges repeatedly that defendant Emil Mazey was hostile towards him and sought his discharge because of such hostility. Hostility or bad faith on the part of Mazey or the UAW is, of course, irrelevant to the issue here. As those defendants correctly point out, an employer —and here the UAW is the employer—may be as hostile to

an employee as it wishes so long as it does not breach the collective bargaining agreement.

In sum, plaintiff has failed to make a showiing of bad fath required by *Balowski.* Defendants are, therefore, entitled to summary judgment. It is unnecessary to consider the other issues raised by the motions.

/s/ James P. Churchill
United States District Judge.

Dated: April 18, 1975.

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

At a session of said court held in the Federal Building and U. S. Courthouse, Detroit, Michigan, on April 18, 1975.

Present: Honorable James P. Churchill, United States District Judge.

It Is Hereby Ordered that the defendants' motions for summary judgment filed in the above-entitled matter be and hereby are granted for the reasons set forth in a Memorandum Opinion of the Court entered on this date.

/s/ James P. Churchill
United States District Judge

MOTION FOR REHEARING

(Filed May 2, 1975)

Now comes Jack Maschhoff, the above named plaintiff, by Davidow & Davidow, his attorneys, and moves this Court to set aside the Order granting the defendants' motions for Summary Judgment and to grant a rehearing in pursuance of Rule IX A of the Rules of the United States District Court for the Eastern District of Michigan, Southern Division, for the following reasons:

1. Plaintiff's action was not instituted in the United States District Court under the Labor-Management Relations Act, as stated in the Court's opinion. Suit was started in the Wayne County Circuit Court of Michigan, and was removed to this Court by the several defendants upon the allegation that this Court had original jurisdiction by reason of the Labor-Management Relations Act; plaintiff's cause of action was properly started in the Wayne County Circuit Court of Michigan as the *United States District Court does not have exclusive jurisdiction* of claims such as the claim of plaintiff, as appears by the case of *Lowe v. Hotel Employes*, 389 Mich 123, 141-2, 146-7 (1973); also the case of *Vaca v. Sipes*, 386 U.S. 171, 17 Fed 2d 842-862 (1967) in which the Supreme Court held that State Courts have jurisdiction in such cases. (Both cases are cited in the Brief filed herewith)

2. The Court's opinion is based upon a misapprehension of the facts.

3. The Court's opinion is based upon a misapprehension of the law.

4. The plaintiff in his Complaint and Affidavit and exhibits in support of his answers and opposition to motion

of defendants for Summary Judgment clearly established that plaintiff had been improperly discharged.

5. It is clearly set forth in Plaintiff's Complaint and affidavit in opposition to defendant's motions that the defendants had acted in collusion to deny him the rights guaranteed him under the union agreement and the Constitution of defendant Newspaper Guild.

6. Plaintiff's complaint is in compliance with Rule 8 (a) of the Federal Rules of civil procedure, as amended, the provisions of which were obviously overlooked by the Court in his opinion; plaintiff's allegations are simple, concise, and direct, and succinctly state his claim.

"Rule 8. General Rules of Pleading

a Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new ground of jurisdiction to support it, (2) *a short and plain statement of the claim showing that the pleader is entitled to relief,* and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded. (emphasis ours)

Pleading to Be Concise and Direct; Consistency.

e (1) *Each averment of a pleading shall be simple, concise, and direct.* No technical forms of pleading or motions are required. (emphasis ours)

f Construction of Pleadings. *All pleadings shall be so construed as to do substantial justice.* (emphasis ours)

7. The Court overlooked the general rule of law, consistently followed by the Courts, both Michigan and Federal, that in motions for Summary Judgment the facts alleged and inferences properly drawn therefrom must be construed in the light most favorable to the party opposing the motion.

8. The Court was mistaken in the language of his opinion when he said "he was told that his lay-off was necessary because of the UAW poor financial condition." Defendant Emil Mazey's letter of discharge, June 1970, Exhibit 6, attached hereto, and made a part hereof, makes no mention of any financial reason, but on the contrary asserts that the work done by plaintiff was no longer to be done for the UAW.

9. The alleged claim for discharge for financial reasons was first expressed a substantial time after plaintiff's discharge, and is contradicted by the financial statement prepared by defendant Emil Mazey, a copy of which is marked "Ex. 1," attached hereto and made a part hereof, and which, *inter alia,* reads as follows:

> "LIQUID ASSETS. Liquid Assets (Resources of the Union which can be readily converted to cash) amounted to $88,040,869.63 on February 28, 1970"

A Directive of May 27, 1970, shortly before the discharge of plaintiff, substantially increased "out of town per diem allowances" Exhibit 2, attached hereto and made a part hereof.

10. The Court failed to consider that the language of the union agreement made compulsory the necessity of defendant Newspaper Guild to insist upon and bring about arbitration of plaintiff's claim.

The language of Paragraph 3, Article IX of the grievance procedure of the Union Agreement provides:

> "3. *Any grievance relating to the contract which has not been satisfactorily settled within thirty (30) days of its first consideration, shall be submitted to final and binding arbitration* with the exception that renewal of this contract is not an arbitrable matter. • • • "

11. The Court was grieviously misled by the affidavits of officials of defendant Newspaper Guild, together with the statement of Miller, attorney for the Newspaper Guild, in asserting that at two meetings of the Executive Board of Local 22 of defendant Guild:

> "The Guild did not seek arbitration of the grievance. In the Fall of 1970, the Executive Board of Local 22 of the Guild, twice considered the plaintiff's grievance, and decided not to request arbitration."

The assertions made by officials of defendant Guild, under oath, and the supporting statement of its counsel, Miller, were untrue, as manifested by the minutes of a meeting of the Executive Board of September 17, 1970 marked "Ex. 3," attached hereto and made a part hereof, which, inter alia, reads as follows:

> "It was moved by Si Alpert that the Executive Board authorize the Executive Secretary to take all steps necessary, up to and including arbitration, to resolve the Community-Labor Unit Grievance involving the dismissal of Jack Maschhoff. Seconded by Ralph Kingzett. Motion carried."

A further example of the misstatements of officials of the Newspaper Guild is indicated in Frances d'Hondt's affidavit in which she repeats the statement as to action of the Executive Board at a meeting in the fall of 1970. At the meeting of September 17, 1970 Frances d'Hondt was not present

as appears by Exhibit 3, Minutes of said meeting, attached hereto and made a part hereof; McMahon was present at this meeting and knew, or must have known, of the adoption of the Motion in reference to authorization for the union "to take all steps necessary to and including arbitration."

That at the membership meeting at which the question of plaintiff's grievance was taken up and the matter of arbitration was voted upon the vote was 23 to 23; Miller, attorney for the Guild and also attorney for UAW locals, then made the statement that arbitration would be futile and the presiding officer then cast the deciding vote against arbitration.

12. The Court mistakenly indicates in his opinion that the plaintiff had the responsibility of exhausting the remedy within the union, defendant Guild; the Union-Management agreement makes no provision for any other procedural step than the filing of a grievance action upon the same by negotiation, and the last step, arbitration. We invite the Court's attention to the exhibits attached to plaintiff's Answer to the Guild's Motion for Summary Judgment, particularly Exhibits 5 and 10, copies of which, marked "Ex. 4" and "5" are attached hereto and made a part hereof.

13. The cases cited by the Court in his opinion, as well as offered by plaintiff, clearly sustain the position of the plaintiff in his right to prosecute his suit against the defendants.

14. The case of *Vaca v. Sipes,* 386 U.S. 171, 17 L Ed 2 842, (1967) comprising 25 pages, overwhelmingly supports plaintiff's position. We feel justified in quoting extensively from this opinion pp 850, 851, 852, 853, 854, 855, 856, 857, 859, 860, 861, 862, in our Brief, filed herewith.

15. Plaintiff respectfully submits that the reasons hereinabove set forth in his motion for Rehearing and the brief filed in support thereof, clearly demonstrates the palpable

defects by which this Court has been misled, and that a different disposition of the case in favor of the plaintiff must result from a correction thereof.

The concurrence of counsel for the respective parties in the relief sought by plaintiff in the foregoing motion had been requested on April 21, 1975, and the concurrence has been denied, and therefore it is necessary to bring this Motion.

WHEREFORE, plaintiff respectfully urges that the Order for Summary Judgment be set aside and held for naught, and the motions for Summary Judgment be denied.

DAVIDOW & DAVIDOW
By /s/ Larry S. Davidow
Attorney for Plaintiff
3210 Book Tower
Detroit, Michigan 48226
962-9144

Dated: Detroit, Michigan
this 29th day of April, 1975

CERTIFICATE OF COUNSEL

Larry S. Davidow, member of the law firm of Davidow & Davidow, attorneys for the plaintiff in the above cause and in personal charge of said action on behalf of plaintiff, does hereby certify that said Motion for Rehearing is brought in good faith, and not for purposes of delay.

Counsel for plaintiff respectfully prays for oral argument on this Motion for Rehearing.

/s/ Larry S. Davidow

State of Michigan,
County of Wayne—ss.

Larry S. Davidow, being duly sworn, deposes and says that he is a member of the law firm of Davidow & Davidow, attorneys of record for the plaintiff in the above cause.

Deponent further says that he has had personal charge of the above cause on behalf of plaintiff, and that he makes this affidavit in support of the Motion for Rehearing.

Deponent further says that he has read the Motion by him subscribed on behalf of the plaintiff and that he believes the same should be granted for the reasons therein set forth.

/s/ Larry S. Davidow

ORDER DENYING MOTION FOR REHEARING

At a session of said court held in the Federal Building and U.S. Courthouse, Detroit, Michigan, on June 3, 1975.

Present: Honorable James P. Churchill, United States District Judge.

The plaintiff's Motion for Rehearing of Defendants' Motions for Summary Judgment has been considered; and

It Is Hereby Ordered that the motion is denied on the grounds that said motion presents the same issues already ruled upon by the Court and fails to demonstrate any defect by which the Court was misled which could lead to a different disposition of the matter.

/s/ James P. Churchill
United State District Judge

APPENDIX B

ORDER DISMISSING APPEAL FOR LACK OF JURISDICTION

No. 75-1922

United States Court of Appeals
For the Sixth Circuit

(Filed November 3, 1975)

John P. Hehman, Clerk

Jack Maschhoff,
Plaintiff-Appellant,
v
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 22 of the Newspaper Guiild, a/k/a Newspaper Guild of Detroit, and Emil Mazey,
Defendants-Appellees.

Before Weick, Edwards and Celebrezze, Circuit Judges.

Upon consideration, it is Ordered that the joint motion to dismiss the appeal be and it is hereby granted and the appeal is dismissed for lack of jurisdiction. Rule 4(a) Federal Rules of Appellate Procedure.

The filing of a motion in the District Court for rehearing of an order of the District Court entered on April 18, 1975 granting defendants' motion for summary judgment, which motion for rehearing was not filed until May 2, 1975, did not toll the running of the thirty days' period in which notice of appeal was required to be filed. Rule 59(e) Federal Rules of appeal was required to be filed. Rule 59(e) Federal Rules of Civil Procedure, Martin v Wainwright, 469 F. 2d 1072 (5th Cir. 1972).

Entered By Order of the Court

John P. Hehman, Clerk

APPENDIX B

ORDER DENYING PETITION FOR REHEARING

No. 75-1922

United States Court of Appeals
For the Sixth Circuit

(Filed December 22, 1975)

John P. Hehman, Clerk

Jack Maschhoff,
Plaintiff-Appellant,
v
International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, et al,
Defendants-Appellees

Before Weick, Edwards and Celebrezze, Circuit Judges.

Upon consideratioon, the petition for rehearing is hereby denied.

Entered by Order of the Court.

John P. Hehman, Clerk